5-27-2009

Alcohol Beverage Control v. Boyd Appellant's Brief Dckt. 36124

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALCOHOL BEVERAGE CONTROL,	)	
	)	NO. 36124-2009
Plaintiff/Appellants,	)	
v.	)	
GORDON J. BOYD, Licensee dba, SHOT GLASS,	)	
Defendant/Respondent.	)	

BRIEF OF APPELLANT

Appeal from the District Court of the Second Judicial District
of the State of Idaho, in and for the County of Clearwater

Honorable John H. Bradbury
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Respondent, Gordon Boyd ("Mr. Boyd") sought a petition for review before the district court to determine whether I.C. § 23-615 is unconstitutional and from the hearing officer's decision finding that Mr. Boyd, through his employees, served an apparently intoxicated person. ABC now appeals the decision of the district court that concluded that I.C. § 23-615 is unconstitutional on its face.

Statement of the Facts and Course of the Proceedings

The Shot Glass, located in Orofino, Idaho, is the premises where Mr. Boyd is licensed by ABC to serve beer and liquor by the drink. (R. p.51, Lodged Documents, Transmittal of the Record, Retail Alcohol Beverage License). On September 16, 2006, just shortly after midnight, at approximately 12:05 a.m., Idaho State Police ABC investigators Gregory Harris ("Harris") and Timothy Davidson ("Davidson") cited Dawn Molar, a bartender working at the Shot Glass, for violating I.C. § 23-615, in that she allegedly served an alcoholic beverage to Justin Anderson, an apparently intoxicated person, while she was an employee of the Shot Glass. (R. pp 15-17, 20). Then the following evening before midnight, which was still September 16, 2006, at approximately 11:30 p.m., Idaho State Police ABC investigators Harris and Davidson witnessed an apparently intoxicated person at the Shot Glass being served alcohol. (R. pp. 18-19). No employee of the Shot Glass was cited at this time as the officers feared that any confrontation might have compromised their safety. (R. p. 51, Lodged Documents, Tr. of

Audio Proceedings, p. 45, L. 6-25, p. 46, p. 47).

On December 26, 2006, Administrative Complaints 06ABC-COM077 and 06ABC-COM078, were served upon Respondent that incorporated two Administrative Violation Notices, dated October 12, 2006, alleging that licensee, Mr. Boyd, dba Shot Glass, by and through its employees, served alcohol to a person who was actually, apparently or obviously intoxicated in violation of I.C. § 23-615(2). (R. pp. 51, Lodged Documents, Transmittal of the Record, Complaint for Suspension of Retail Alcohol Beverage License 06ABC-COM077 and 06ABC-COM078).

On October 26, 2007, Mr. Boyd moved to dismiss both Complaints on the grounds that I.C. § 23-615(2) is unconstitutionally vague and indefinite, and thus facially invalid. (R. pp. 51,)

On November 15, 2007, a hearing was held before the hearing officer. (R. p. 51, Lodged Documents, Tr. of Audio Proceedings). The hearing officer denied Mr. Boyd's motion to dismiss based on a hearing officer's lack of authority to rule on constitutional issue, but heard the evidence on the two administrative violations. (R. pp. 51, Lodged Documents, Tr. of Audio Proceedings, p. 6, Ls 15-25, p. 7, p.8, Ls 1-14).

On December 4, 2007, the hearing officer filed a Memorandum, Decision and Preliminary Order deciding the two Complaints. (R. pp. 3-20). In his findings, the hearing officer concluded that ABC had met its burden of proof in case number 06ABC-COM077, but did not meet its burden of proof in case number 06ABC-COM078. Mr. Boyd did not seek agency review and the order became final by operation of law on December 18, 2007.

On January 2, 2008, Mr. Boyd timely filed a Petition for Judicial Review of the

Findings of Fact and Conclusions of Law contained in the hearing officer's Memorandum Decision and Order decision and moved to stay the suspension of the license as imposed by the final order. (R. pp. 1-2). The district court granted the Motion to Stay. (R. pp. 24-25). On November 18, 2008, oral argument was heard. On December 23, 2008, a Memorandum Decision and Order was issued finding that I.C. § 23-615 was unconstitutional on its face. (R. pp. 30-46). ABC timely appealed. (R. pp. 48-50).

STANDARD OF REVIEW

The constitutionality of a statute or administrative regulation is a question of law over which the Court exercises free review. There is a presumption in favor of the constitutionality of the challenged statute or regulation, and the burden of establishing that the statute or regulation is unconstitutional rests upon the challengers. An appellate court is obligated to seek an interpretation of a statute that upholds it constitutionality. The judicial power to declare legislative action unconstitutional should be exercised only in clear cases. *See, American Falls Reservoir Dist. No. 2. v. Idaho Dep't of Water Resources*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007).

ISSUE PRESENTED ON APPEAL

Whether the district court erred when it held that I.C. § 23-615 is unconstitutional.

ARGUMENT

I. Idaho Code Section 23-615 Is Not Unconstitutionally Overbroad

A. Introduction

Mr. Boyd's argument to the district court challenged the constitutionality of I.C. § 23-615 on the grounds that it is facially unconstitutional and/or unconstitutional as

applied. The district court determined there is a protected property interest in operating a business and I.C. § 23-615 is overbroad because there is no objective standard by which licensees or their employees can determine when a patron is apparently intoxicated.

B. Standard of Review

An overbreadth doctrine is applicable only in areas of constitutionally protected activity and may render void legislation which is lacking neither in clarity nor precision *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294 (1972); *Cameron v. Johnson*, 390 U.S. 611, 88 S. Ct. 1335 (1968), *reh'g denied*, 391 U.S. 971, 88 S. Ct. 2029 (1968). When presented with a facial overbreadth challenge, the Court must determine whether the statute restricts a *substantial amount* of constitutionally protected conduct. *State v. Korsen*, 138 Idaho 706, 714, 69 P.3d 126, 133 (2003) (emphasis added). "The test may be otherwise stated as whether the statute is unconstitutional in a substantial portion of the cases to which it applies." *Korsen* at 134, *citing, State v. Leferink*, 133 Idaho 780, 785, 992 P.2d 775, 780 (1999).

C. I.C. § 23-615

Idaho Code section 23-615 provides:

> **Restrictions on sale.** No person licensed pursuant to title 23, Idaho Code, or his or its employed agents, servants or bartenders shall sell, deliver or give away, or cause or permit to be sold, delivered, or given away, or allowed to be consumed, any alcohol beverage, including any distilled spirits, beer or wine, to:
>
> (1) Any person under the age of twenty-one (21) years, proof of which shall be a validly issued state, district, territorial, possession, provincial, national or other equivalent government driver's license, identification card or military identification card bearing a photograph and date of birth, or a valid passport.

(2) Any person actually, apparently or obviously intoxicated.

(3) An habitual drunkard.

(4) An interdicted person.

Any person under the age of twenty-one (21) years, or other person, who knowingly misrepresents his or her qualifications for the purpose of entering licensed premises or for obtaining alcohol beverages from such licensee shall be equally guilty with such licensee and shall, upon conviction thereof, be guilty of a misdemeanor.

D. I.C. § 23-615 Does Not Infringe on a Constitutional Protected Right

1. The "facially overbroad" challenge to I.C. § 23-615 fails on its merits.

Mr. Boyd in this case cannot show how the result of application of the statute upon a constitutionally protected right could be considered "substantial," as is required to sustain his challenge that I.C. § 23-615 is facially overbroad. A statute will not be invalidated for overbreadth merely because it is possible to imagine some unconstitutional applications. *Members of City Council v. Taxpayers of Vincent*, 466 U.S. 789, 800, 104 S.Ct. 2118, 2126 (1984). This Court has stated that "rather, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Korsen* at 714. Therefore, this Court has applied the requirement that any argued overbreadth must be "substantial" before the statute will be held unconstitutional on its face. *Id.* If this court elects to give the words "actually," "apparently," and "obviously" their plain meaning, Mr. Boyd has failed to establish that the enforcement of the statute would unlawfully affect those licensed to sell and serving alcohol legally in the least, let alone "significantly."

Idaho Code § 23-615 should not be invalidated as overbroad because the conduct it regulates is very specific to the over service of alcohol to those who are "actually,

apparently or obviously intoxicated." I.C. § 23-615. Additionally, the statute applies only to people and premises licensed to serve alcohol. Only those licensed individuals who choose to serve alcohol to clients who are "actually, apparently or obviously intoxicated" risk enforcement action for their violation of the law. While it is theoretically possible that a licensed person could be charged with overserving alcohol in a case where the client was not intoxicated, this hypothetical situation is surely limited to a small number of cases given the training, experience, technology, and observations available to licensed servers of alcohol (and to law enforcement personnel). Overbreadth is not substantial if, "despite some possibly impermissible application, the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.' " *Sec'y of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 964-65, 104 S.Ct. 2839 (1984).

There is no significant danger that the lawful conduct of licensed alcohol servers on licensed premises will be significantly compromised by enforcement of this statute. Therefore, Mr. Boyd's facial challenge that I.C. § 23-615 is overbroad must necessarily fail.

2. Mr. Boyd fails to demonstrate that the language of I.C. § 23-615 is vague.

A statute is void for vagueness if it (1) fails to define the criminal offense with sufficient clarity to provide an ordinary person with notice of the prohibited conduct, or (2) "fails to establish minimal guidelines to govern law enforcement" or others who must enforce the statute. *State v. Bitt*, 118 Idaho 584, 585, 798 P.2d 43, 44 (1990). A statute is not vague if it gives people a reasonable opportunity to know what conduct is prohibited. *Id.* Additionally, "[t]he constitutional standards underlying the vagueness doctrine have

never required that every word used in a criminal statute be statutorily defined." *State v. Hammersley*, 134 Idaho 816, 821, 10 P.3d 1285, 1290 (2000).

While an officer is required to make an arguably subjective determination that a licensed server of alcohol did serve alcohol to a person "actually, apparently or obviously intoxicated," the common meaning and understanding of the words of the statute save I.C. § 23-615 from being overly vague.

"Laws are enacted to be read and obeyed by the people and in order to reach a reasonable and sensible construction thereof." *Lewiston v. J.B. Mathewson*, 78 Idaho 347, 354, 303 P.2d 680, 684 (1956). Thus, terms that are in common use among the people at whom the statute is directed "should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold them." *Id.* ABC is allowed to rely on the logical inference that people of ordinary intelligence will be able to understand the use of common words in the English language. Such words would include "actually," "apparently," "obviously" and "intoxicated." Mr. Boyd here argues that there is no way for a bartender to know when a patron is "actually intoxicated" except for a scientific test. However, that ignores the other two descriptive words of the statute: "apparently and obviously." Officers Harris and Davidson witnessed the patron in the Shot Glass's behavior and recognized the signs of apparent intoxication. Through television, movies, and comedians, even non-drinkers can recognize the signs of intoxication. The bartender in this case testified that she was trained to recognize intoxicated persons. (R. pp. 51, Lodged Documents, Tr. of Audio Proceedings, p. 118, ll. 3-22).

3. Mr. Boyd fails to establish that I.C. § 23-615 is subject to arbitrary and discriminatory enforcement.

"A statute avoids problems with arbitrary and discriminatory enforcement "by identifying a core of circumstances to which the statute or ordinance unquestionably could be constitutionally applied." *State v. Cobb*, 132 Idaho, 195, 197, 969 P.2d 244, 247, *citing, State v. Bitt*, 118 Idaho at 588, 798 P.2d at 47. I.C. § 23-615 uses plain words to describe the conduct proscribed. The words "actually," "apparently," and "obviously," as they modify the word "intoxicated" in I.C. § 23-615, do not render the statute void for vagueness. A person's level of intoxication can be ascertained through several various methods. Breath tests, blood tests and urine tests are all objective ways to determine intoxication. Actual knowledge also prohibits one from serving a person he knows to be intoxicated. That knowledge could be gleaned from observations of the person's prior drinking, from the results of a BAC test, or from the person's admission of intoxication to the bartender.

In the second situation, the server is expected to decline service to a person "obviously intoxicated." Signs of obvious intoxication include the usual factors cited by police officers in DUI investigations: slurred speech; bloodshot eyes; loss of balance; vomiting. Finally, servers may not serve persons "apparently intoxicated." This category includes those persons who appear, to all outward appearances, to be intoxicated, even if they may not be. In this situation, if a person in the reasonable bartender's shoes had no other information, and if ABC can show that the person should have appeared to be apparently intoxicated to that reasonable bartender, then the statute prohibits service.

The district court below found that attitudes vary according to community, cultural and personal bias standards that make the phrase "apparently intoxicated" subjective and therefore the statute is void because it leaves a community to speculate as to what "apparently intoxicated" should mean. As cited above, however, this Court has ruled that a statute avoids problems of arbitrary or discriminatory enforcement by identifying core circumstances to which the statute or ordinance unquestionably could be constitutionally applied. *State v. Cobb*, 132 Idaho, 195, 197, 969 P.2d 244, 247, *citing Bitt*, 118 Idaho at 588, 798 P.2d at 47.

This Court's task therefore is to evaluate I.C. § 23-615 and identify a core set of circumstances where application of the statute would be constitutional. ABC suggests to the court that just such a "core set of circumstances where application of the statute would be constitutional" can be identified here. In fact, the district court below found that the hearing officer did not err in concluding that Anderson was served by the Shot Glass bartender when he was obviously intoxicated. (R. pp. 34-37).

The use of several adverbs to modify the term "intoxicated" in I.C. § 23-615 should lead this Court to find that a reader is on notice that anyone who is "actually, apparently, or obviously intoxicated" should not be served alcohol. By including the adverbs "actually," "apparently," and "obviously" in the language of I.C. § 23-615, the Idaho Legislature has made such a task simple, especially given the facts in this case.

I.C. § 23-615 is not a statute of universal application. It only applies to the conduct of "person[s] licensed pursuant to Title 23, Idaho Code, or his or its employed agents, servants, or bartenders . . ." I.C. § 23-615. Those individuals to whom this

statute is directed should be able to identify when a person is actually, apparently, or obviously intoxicated. Training is available for servers to develop such ability.

Since it is not in contention that the Legislature has broad power to define who may and may not consume alcohol, as well as regulating when and where this consumption can occur, there clearly exist circumstances in which I.C. § 23-615 may be constitutionally applied.

Idaho Code § 23-615 provides sufficient guidelines to prevent arbitrary and discriminatory enforcement. The statute at issue is unlike the loitering ordinance struck down as vague in *State v. Bitt*, 118 Idaho at 585, 798 P.2d at 44, which allowed police unbridled discretion in determining whether the explanation offered by a loitering suspect was sufficient to dispel the officer's alarm for the safety of persons or property. In fact, pursuant to Idaho Code § 23-615, the determination of whether a person is intoxicated could be completed in a number of objective ways aside from an officer's testimony of his own observations. These include eye-witness testimony and the use of breath tests, urine tests, or blood tests to determine a person's actual level of intoxication.

In many instances when applying the requirements of other sections of the Idaho Code, law enforcement officers are called upon to make a determination as to whether a person is intoxicated, whether under the influence of alcohol or some other illegal substance. Police officers receive training to determine a person's level of intoxication. Law enforcement experience allows police officers to gain additional "on-the-job" training in observing levels of intoxication. (The same experience is likewise available through years of experience serving alcohol to customers who have consumed varying

amounts of alcohol, such as the experience possessed by the bartender in this case. See R. p. 51 lodged Documents, Tr. of Audio Proceedings, p, 117, Ls 13-25, p. 118, p. 124, Ls 8-16, p. 138, Ls 8-24, p. 139, Ls 5-20, p. 141, Ls 19-25, p. 143, Ls 13-14). In court, even a layperson may testify as to a person's level of intoxication, assuming a proper foundation is laid for the layperson's knowledge.

E. The Conduct proscribed by I.C. § 23-615 is not protected activity.

The overbreadth doctrine applies to statutes which, though designed to prohibit legitimately regulated conduct, include within their prohibitions constitutionally protected freedoms. *State v. Leferink*, 133 Idaho 780, 785 (1999) *citing, State v. Richards*, 127 Idaho 31 (Ct.App.1995). The district court below mistakenly opines that prohibiting the service of alcohol to "actually," "apparently" or "actually intoxicated" persons will deprive a licensee of a protected property interest. (R. p. 38). Unfortunately, the district court has confused the punishment from a violation of the statute (suspension of the alcohol beverage license) with the prohibited conduct.

In this case there is no dispute that the state of Idaho may grant a license for the sale of alcoholic beverages and that once issued ABC must grant due process before suspending or revoking the license. *Northern Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 449, 926 P.2d 213, 215 (Ct. App. 1996. However, the district court below erroneously finds that once licensed a business with an alcohol beverage license is granted a non-existent constitutional privilege in the continued ability to sell alcoholic beverages. (R. pp. 38-41). If the district court's reasoning is followed, then ABC could never suspend or revoke an alcohol beverage license even after affording the

licensee due process. Because the analysis of the district court is flawed, I.C. § 23-615 should not be determined to be overbroad.

II. Case law from other jurisdictions is instructive on the issues of overbreadth and vagueness.

While this is a case of first impression for the State of Idaho, Mr. Boyd's challenge is not the first to this area of law. *State v. Cotton*, 686 S.W.2d 140, 142 (1985) was decided in 1985 in Texas. In that case, Defendant was charged under the Alcohol Beverage Control Act of Texas, the violation of which represented a criminal misdemeanor. The case held:

> [T]here is a substantial and significant distinction between the criteria "an intoxicated person" or a person "under the influence of alcohol ... to the degree that he may endanger himself or another" and the criteria "a person showing evidence of intoxication. The latter category encircles and describes not only those who are so intoxicated that they exhibit "outward signs" of that condition, but also those who are not intoxicated, yet, nevertheless, exhibit one or more of the classic symptoms of intoxication that are universally accepted as "evidence" in criminal cases. Therein lies the problem.

State v. Cotton, 686 S.W.2d 140, 142 (1985).

As this Court can see, the Texas Court of Appeals found the phrase "a person showing evidence of intoxication" did put bartenders in the position of guessing at whether a person was showing evidence of intoxication and, therefore, the language was vague. *Id.* at 143. The Court, however, stated that it likely would have upheld the statute if the language had been akin to other Texas statutes which simply stated "an intoxicated person." *Id.* at 142. Any attempt to link I.C. § 23-615 to the unconstitutional Texas statute carries little weight when the opinion of the Texas court is read in its entirety.

The concurring opinion of Judge Teague in *State v. Cotton* is particularly instructive. Judge Teague indicated that he wrote to give the Texas Legislature notice so that this Texas statute can be drafted in such a way that it can be deemed constitutional. Judge Teague wrote: "I believe that there is a world of difference in meaning between the phrase 'showing evidence of intoxication' and the phrases 'obviously intoxicated' 'visibly intoxicated' or 'actually or apparently under the influence of liquor.'" *Id.* at 143. Judge Teague goes on to say that "[w]ithout question, to uphold such a statute as we have here would permit an overzealous member of law enforcement to unlawfully invade the privacy of some of our citizens. As to the other phrases, however, I find that facially they are sufficiently clear to put one person on notice that another person has consumed one too many beers." *Id.* It is clear that the Texas legislature read Judge Teague's opinion, because the Texas statute prohibiting overservice of alcohol now reads:

> This chapter does not affect the right of any person to bring a common law cause of action against any individual whose consumption of an alcoholic beverage allegedly resulted in causing the person bringing the suit to suffer personal injury or property damage.(b) Providing, selling, or serving an alcoholic beverage may be made the basis of a statutory cause of action under this chapter and may be made the basis of a revocation proceeding under Section 6.01(b) of this code upon proof that: (1) at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated (emphasis added) to the extent that he presented a clear danger to himself and others; and (2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

Texas State Alcohol Beverage Control Act, Title 2, Chapter 2. Further, ABC notes that the Texas overservice misdemeanor code section, which reads "a person commits an offense if the person with criminal negligence sells an alcoholic beverage to a habitual drunkard or an intoxicated or insane person" was challenged in 1981 and survived its

own constitutional challenge for vagueness. *See Campos v. State*, 623 S.W.2d 647 (Tex. Ct. App., 1981).

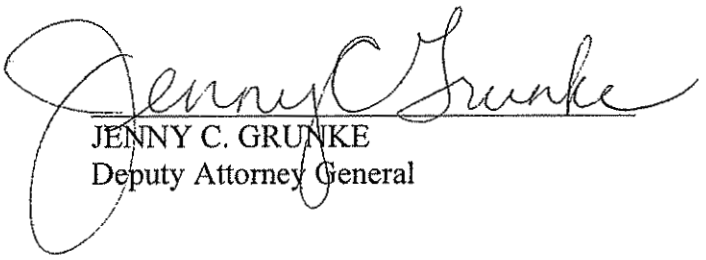
A review of cases from around the United States show that many statutes use the words "obviously" and "intoxicated" in enforcing the overservice laws. These states include Idaho's regional neighbors California and Arizona. *See,* California Business and Professions Code, Division 9, Chapter 16, Article 1, Section 25602; Arizona State Code, Title 4, Article 3, Chapter 4-244. The Revised Code of Washington simply states "No person shall sell any liquor to any person apparently under the influence of liquor." R.C.W. 66-44-200. Clearly, this statute is similar to I.C. § 23-615, which reads "actually, apparently or obviously intoxicated."

Lastly, there is an Alaska Court of Appeals Decision from 1982, *O'Donnell v. Municipality of Anchorage*, 642 P.2d 835 (Alaska App., 1982). *O'Donnell* on appeal argued that the statute, which stated "It is unlawful for any person to sell, furnish, give or deliver any alcoholic liquor to anyone who is visibly intoxicated or who is under the age of 19 years," was unconstitutionally vague as to the term "visibly intoxicated." *Id.* The Court held "we also reject O'Donnell's assertion that the term "visibly intoxicated" as used in AMC 8.05.010(A) is unconstitutionally vague and overbroad." *Id.* at 837. In sum, a review of similar statutes from around the United States show that many states use language similar to that of I.C. § 23-615, and in every instance the similar language has been upheld as constitutional.

CONCLUSION

ABC respectfully requests that this Court reverse the district court's decision.

Dated this 26th day of May, 2009.



JENNY C. GRUNKE
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 2009, I caused to be served a true and correct copy of the foregoing **APPELLANT'S BRIEF** in the above-referenced matter by United States Mail, Postage paid, and addressed to the following:

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